SUPREME COURT, U.S.

AUG 30 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 416

C. BOYD CORSA, FISH PRODUCTS COMPANY OF NEW JERSEY, A NEW JERSEY CORPORATION, ATLANTIC NAVIGATION COMPANY, A NEW JERSEY CORPORATION, SEACOAST PRODUCTS, INC., A DELAWARE CORPORATION, AND FISH PRODUCTS COMPANY, A DELAWARE CORPORATION, *Plaintiffs-Appellants*,

vs.

JOHN P. TAWES, FRED P. GLOSE AND JOHN R. JEWELL, CONSTITUTING THE COMMISSION OF TIDEWATER FISHERIES OF MARYLAND, AND DANIEL T. PRETTYMAN, STATE'S ATTORNEY FOR WORCESTER COUNTY, MARYLAND, *Defendants-Appellees*,

EDWIN ALLISON, JOHN LOWRY, DAVID H. HART, INC., A NEW JERSEY CORPORATION, ATLANTIC FISHING CO., INCORPORATED, A VIRGINIA CORPORATION, PENINSULA FISHERIES, INCORPORATED, A NEW JERSEY CORPORATION, HAYLOW FISHERIES, INCORPORATED, A VIRGINIA CORPORATION, RAYMOND L. HAYNIE, INCORPORATED, A VIRGINIA CORPORATION, NEW JERSEY MENHADEN PRODUCTS, INC., A NEW JERSEY CORPORATION, STANDARD PRODUCTS CO., INCORPORATED, A VIRGINIA CORPORATION, REEDVILLE OIL AND GUANO CO., INCORPORATED, A VIRGINIA CORPORATION, MOTOR VESSEL H. R. HUMPHREYS, INCORPORATED, A VIRGINIA CORPORATION, *Intervening Plaintiffs-Appellants*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

STATEMENT AS TO JURISDICTION

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VS.

JOHN P. TAWES, FRED P. GLOSE AND JOHN R. JEWELL, CONSTITUTING THE COMMISSION OF TIDEWATER FISHERIES OF MARYLAND; AND DANIEL T. PRETTYMAN, STATE'S ATTORNEY FOR WORCESTER COUNTY, MARYLAND, *Defendants-Appellees,*

EDWIN ALLISON, JOHN LOWRY, DAVID H. HART, INC., A NEW JERSEY CORPORATION, ATLANTIC FISHING CO., INCORPORATED, A VIRGINIA CORPORATION, PENINSULA FISHERIES, INCORPORATED, A NEW JERSEY CORPORATION, HAYLOW FISHERIES, INCORPORATED, A VIRGINIA CORPORATION, RAYMOND L. HAYNIE, INCORPORATED, A VIRGINIA CORPORATION, NEW JERSEY MENHADEN PRODUCTS, INC., A NEW JERSEY CORPORATION, STANDARD PRODUCTS CO., INCORPORATED, A VIRGINIA CORPORATION, REEDVILLE OIL AND GUANO CO., INCORPORATED, A VIRGINIA CORPORATION, MOTOR VESSEL H. R. HUMPHREYS, INCORPORATED, A VIRGINIA CORPORATION, *Intervening Plaintiffs-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

STATEMENT AS TO JURISDICTION

In compliance with Rule 13(2) and Rule 15 of the Revised Rules of the Supreme Court of the United States, as amended, Plaintiffs-Appellants and Intervening Plaintiffs-

Appellants, hereinafter jointly referred to as Appellants, submit herewith their statement particularly disclosing the basis upon which this Honorable Court has jurisdiction on appeal to review the judgment of the specially constituted three-judge district court entered in this cause.

Opinion Below

The opinion of the District Court for the District of Maryland, sitting as a specially constituted three-judge court, is reported in 149 F. Supp. 771. A copy of the opinion is included herewith as Appendix A.

Jurisdiction

This case involves a proceeding brought pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 964, as amended May 24, 1949, c. 139 §111, 63 Stat. 105, and Aug. 28, 1954, c. 1033, 68 Stat. 890 (28 U. S. C. Secs. 2201, 2202), and 62 Stat. 968 (28 U. S. C. Secs. 2281, 2284), for a declaratory judgment as to the constitutionality of certain statutes of the State of Maryland, and for injunctive relief against the enforcement of those statutes.

The decree of the three-judge district court is dated May 10, 1957, and was entered on that date. A Notice Of Appeal was filed by Appellants in the United States District Court for the District of Maryland on July 5, 1957.

The jurisdiction of this Honorable Court to review this decision on direct appeal is conferred by the Act of June 25, 1948, c. 646, 62 Stat. 926, 961, 968 (28 U. S. C. Secs. 1253, 2101(b), 2281, 2284). The following cases sustain the jurisdiction of this Honorable Court to review the decision on direct appeal in this cause: *Toomer v. Witsell*, 334 U. S. 385, *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245, *Palmetto Fire Insurance Company v. Conn*, 272 U. S. 295.

Statutes Involved

The Maryland statutes, the constitutionality of which is herein involved, are Section 258 and Section 259(a) of Article 66C of the Annotated Code of Maryland (1951), reported in Volume 2, Annotated Code of Maryland (1951) at page 3262. The text of the aforesaid statutes is set forth in Appendix B hereto.

Questions Presented

The following questions and all questions fairly comprised therein are presented by this appeal:

1) Whether Article 66C, Section 259(a) of the Annotated Code of Maryland (1951), which prohibits the use of purse nets for catching fish in Maryland jurisdictional waters, and the effect of which is to prohibit Appellants from carrying on their business of catching an inedible, migratory species of fish, known as menhaden, for commercial purposes, in the waters of the Atlantic Ocean off the coast of Maryland, violates Section I, Article XIV of the Amendments to the Constitution of the United States by depriving the Appellants of liberty and property without due process of law.

2) Whether an undue burden is imposed on commerce, in violation of Article I, Section 8 of the Constitution of the United States, by the aforesaid Maryland statute, the necessary effect of which is to impede and restrain commerce among the states in the products of the menhaden industry.

3) Whether Article 66C, Section 258, of the Annotated Code of Maryland (1951), which prohibits the use of nets of any description for the catching of fish within Maryland jurisdictional waters by others than residents or landowners of Maryland, violates Article IV, Section 2, of the

Constitution of the United States, and Article XIV of the Amendments to the Constitution of the United States, by depriving the individual Appellants of the privileges and immunities of citizens of the United States and by depriving them of the equal protection of the laws, and by depriving the corporate Appellants of the equal protection of the laws.

Statement of Facts and History of Case

Appellants, all non-residents of the State of Maryland, are engaged as boat owners, operators, lessees, or processors, in commerce among the states in menhaden, an inedible migratory fin fish, and the various products derived therefrom. This commerce is an integrated operation consisting of the catching, transporting, delivery, and processing of the said fish, and the preparation, distribution and sale of the various industrial and agricultural products derived therefrom.

The menhaden industry is a large and important one, the total value of its manufactured products in 1955 having exceeded $41,000,000.00. The continuance of this industry and of commerce in its products depends upon the ability of the Appellants and others similarly situated to catch menhaden in quantities sufficient for commercial purposes. The only feasible method of doing this is by use of the type of fishing device known as the purse net.

Menhaden school in their greatest abundance in the ocean waters off the eastern coast of the United States, including the waters off the coast of Maryland, within the three-mile maritime belt. The said Maryland waters are an important segment of the fishing grounds relied upon by the Appellants in following the migration of menhaden in order to procure them in sufficient quantities to supply the industry.

The Defendants-Appellees are officers of the State of Maryland charged with the enforcement of the State's fishing laws. Those laws, namely Sections 258 and 259(a) of Article 66C of the Annotated Code of Maryland (1951), prohibit the use of nets of any description for the catching of fish in Maryland waters by others than residents of Maryland or owners of land in Maryland, and prohibit the use of purse nets by anyone for catching fish in Maryland waters. The necessary and inevitable result of these statutes is to exclude the menhaden industry from Maryland, and to create an artificial zone in which the Appellants are forbidden to carry on an indispensable element of commerce in menhaden. No other state, within the knowledge of the Appellants, completely bars the use of purse nets in catching menhaden.

On June 26, 1956, one of the Appellants, C. Boyd Corsa, a non-resident captain of a menhaden fishing boat, owned by, and under lease by New Jersey and Delaware corporations, was arrested by Maryland authorities for fishing for menhaden with a purse net in the ocean waters off the coast of Maryland. Thereupon, on August 13, 1956, a number of the Appellants brought this suit for a declaratory judgment with respect to the constitutionality of the Maryland statutes, and for injunctive relief.

On August 13, 1956, the United States District Court for the District of Maryland granted a temporary restraining order, restraining the enforcement of Sections 258 and 259 of Article 66C of the Annotated Code of Maryland against the original Plaintiffs, or any of them, or against any captain, officer or member of the crew of any boat owned by any such Plaintiff. Subsequently, by stipulation of the parties and order of court, the temporary restraining order was extended until final disposition of the case.

On September 21, 1956, the other Appellants were granted leave to intervene in these proceedings and seek the same relief. The criminal prosecution of Appellant, C. Boyd Corsa, was voluntarily continued by the Circuit Court of Worcester County, Maryland, pending the final disposition of this action.

Defendants-Appellees filed a motion to dismiss the complaint and intervening complaint, which motion came on for hearing before the three-judge court convened pursuant to 62 Stat. 968, (28 U.S.C. Secs. 2281, 2284). After full argument, the court signed an order overruling the motion to dismiss, and granting an interlocutory injunction embodying the terms of the prior restraining order, and including the Intervening Plaintiffs.

The trial of the case took place on February 25 and 26, 1957, the court's opinion was filed on March 27, 1957, and the decree dismissing the complaint and intervening complaint was signed on May 10, 1957, and entered the same day.

The Questions Are Substantial

The menhaden industry constitutes one of the largest and most important fishing industries in the United States. Its products are necessary and useful in a variety of dependent industries, perhaps the most important of which is the raising of poultry, which relies upon the menhaden industry for its supply of an almost indispensable and otherwise unobtainable protein factor.

The industry comprises an integrated operation which culminates in the reduction of menhaden to its various by-products. In order to catch these inedible fish, the fishing boats follow their migrations along the ocean coast, and whenever and wherever a school is sighted the fishermen

set about to catch them by the use of purse nets, the only device by which menhaden can be caught in quantities sufficient for commercial purposes.

The practical effect of the statutes in question is to exclude all fishing of menhaden in the valuable fishing grounds off the coast of Maryland within the three-mile limit. This requires the Appellants to cease their operations when fish are sighted within the prohibited area, and such operations cannot be resumed until and unless menhaden are sighted elsewhere. The disastrous effect upon the Appellants' business is clear when it is considered that a single catch of menhaden is worth from $7,000.00 to $10,000.00, and that the expense of operating a menhaden fishing boat is more than $1,000.00 a day.

Defendants-Appellees seek to justify the Maryland statutes on the basis that they were enacted as conservation measures and are, therefore, within the scope of the police powers of Maryland.

There is no serious doubt that the Maryland regulations were enacted in response to the unjustified promptings of sport fishermen, who constitute a special interest group within the State. The mistaken belief of this group that a prohibition against menhaden fishing is necessary for the protection of their sport cannot make such prohibition a reasonable conservation measure when, in the opinion of scientists who have devoted their lives to the study of the conservation of fisheries, there is no reasonable relationship between such prohibition and valid conservation objectives. This is especially so in view of credible testimony that purse net fishing does not interfere with sport fishing. "Conservation" is not a term which can be applied haphazardly by a state to any regulation which it seeks to impose, and courts are not bound by legislative declara-

tions of purposes or objectives. *Foster-Fountain Packing Company v. Haydel*, 272 U. S. 1.

During the last decade, largely under auspices of the Fish and Wildlife Service of the United States Department of the Interior, a large and valuable body of scientific knowledge has been developed concerning the habits and biological nature of the menhaden, and the effects of various factors upon its abundance and the abundance of other fishes found in its environment. This knowledge is available and was brought to the attention of the court below.

Some of the foremost scientists in the domain of conservation, not only from the Fish and Wildlife Service, but also from neighboring states and universities, testified in the trial of this case. They stated that it is inconceivable that the prohibitions imposed by the Maryland statutes could be considered to have any reasonable relationship to conservation or any utility or efficacy as conservation measures. Even the biologist employed by the Commission of Tidewater Fisheries of the State of Maryland, who was called as a witness by the Defendants-Appellees, testified that, as applied to menhaden fishing, the Maryland prohibition against the use of purse nets has not been demonstrated to have any justification from a conservation standpoint.

The remedy of these non-resident Appellants should not be confined to an effort to change the Maryland fishing statutes, one of which openly discriminates against non-residents (Section 258 of Article 66C of the Annotated Code of Maryland). There was, neither at the time of the passage of the regulations in question, nor is there now, any activity of any consequence by Maryland residents in the menhaden industry.

If such statutory prohibitions deprive the Appellants of their right to engage in a lawful occupation, and if they unduly interfere with interstate commerce, and deprive the Appellants of the equal protection of the laws and the privileges and immunities of citizens of the several states and of the United States, should the Appellants be required to rely upon the legislature for relief?

These questions are substantial and are of great importance not only to the whole menhaden industry and the purchasers of its products, but also to the development of conservation within and among the states.

1. Under the Due Process Clause of the Constitution of the United States, the right to engage in a lawful occupation may not be interfered with by a state, under the guise of protecting the public interest, by legislative action which is arbitrary or without a real and substantial relation to some purpose within the power of the state to effect, such as the health, safety or morals of its people. *Liggett v. Baldridge*, 278 U. S. 105; *New State Ice Co. v. Liebman*, 285 U. S. 262.

As a general proposition the regulation of coastal fisheries is within the police power of the individual states. *Toomer v. Witsell*, 334 U. S. 385, 393; *Submerged Lands Act of 1953*, 67 Stat. 32, 39, (43 U.S.C. Secs. 1301(e), 1311(a)). This regulatory power, however, is subject to recognized constitutional limitations. To justify a state in imposing its authority in behalf of the public, in the regulation of its fisheries as well as in other aspects of the police power, it must appear — first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and secondly, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. *Lawton*

v. Steele, 152 U. S. 133. In the case last cited the Court upheld the right of New York to prohibit fishing in its inland waters by means other than hook and line. However, the Court stated at page 137:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In view of the undisputed testimony of the scientists who testified in this case that the regulations bear no reasonable relation to a valid conservation objective, it is submitted that the court below should have declared the statutes unconstitutional as an improper exercise of the police power of the State of Maryland, and as a violation of the Due Process Clause of the Constitution of the United States.

2. It cannot be doubted that the Maryland statutes here in question affect interstate commerce. In *Anderson v. Mullaney*, 191 F. 2d 123 (9th Cir. 1951), affirmed, *Mullaney v. Anderson*, 342 U. S. 415, the Court of Appeals held that the great annual movement of fishermen to the Alaskan fishing grounds was the beginning of a chain of interstate commerce, which ended with the delivery of the processed product to dealers in the various states. A territorial tax imposed by Alaska, which tax was many times higher for non-residents than for residents, was held to be an unconstitutional burden on interstate commerce. The court stated at page 129:

> "When we consider that the movement of the fishermen themselves constitutes interstate commerce, it is apparent that the problem presented by appellant's

contention cannot be disposed of by saying that 'the taxable event — the taking of the fish — occurs before the fish have entered the flow of commerce'. It is true that the taking of the fish is a local incident, but if the tax in its practical operation has a discriminatory impact upon some aspect of interstate commerce, the local tax cannot be sustained by simply tying it to a local incident."

Similarly, in the instant case, a chain of interstate commerce begins when the fishermen set out from their ports in the various coastal states, and ends with the delivery of the processed products to the dealers in the several states. Thus, the prohibition here cannot be sustained merely on the grounds that it deals with a "local incident".

In *Manchester v. Massachusetts,* 139 U. S. 240, cited by the court below, it was held that a restriction similar to that in the Maryland statute was not an unreasonable regulation and was valid in the absence of any action by Congress to assume control of the menhaden fisheries in Buzzard's Bay, Masachusetts. However, the opinion does not indicate that the fisherman there involved was engaged in Interstate Commerce or that the menhaden were even being transported to another state. In fact, the Court based its opinion upon the premise that the Commerce Clause does not limit the power of a state to regulate fishing unless such a regulation is in conflict with affirmative legislation enacted by Congress pursuant to the Commerce Clause. Since this early case this Court has made it clear that the Commerce Clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force, creates an area of trade free from interference by the states. *Freeman v. Hewitt,* 329 U. S. 249.

It should also be observed in passing, that in 1891 when the *Manchester* case was decided there was little scientific knowledge concerning the effect of taking menhaden with purse nets on the supply of menhaden.

It has been held that a state regulation affecting interstate commerce, in order to be upheld, must not discriminate against or place an embargo on that commerce, that it must safeguard an obvious state interest, and that the local interest at stake must outweigh whatever national interest there might be in the prevention of state restrictions. *Cities Service Gas Company v. Peerless Oil & Gas Company*, 340 U. S. 179, 186.

It is submitted that the Maryland statutes, in effect, exclude the menhaden industry from Maryland waters and set up a prohibited area obstructing and burdening the economic pattern of the industry along the entire Atlantic coast. Further, that since there is no justification for the regulations as conservation measures there is no valid state interest in the prohibitory statutes, insofar as the menhaden industry is concerned. Certainly the unjustifiable complaints of sport fishermen in and around Ocean City, Maryland, and the economic interests dependent upon sport fishing at that resort, are not interests of such importance that they outweigh the national interest in the preservation of the menhaden industry.

It is a fundamental principle that a state may not promote its own economic advantages by the curtailment or burdening of interstate commerce. As stated by Mr. Justice Jackson in *H. P. Hood & Sons, Inc., v. DuMond*, 336 U. S. 525, 533:

> "The distinction between the power of the state to shelter its people from menaces to their health or safety and from fraud, even when those dangers ema-

nate from Interstate Commerce, and its lack of power to retard, burden or restrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

The enactment, by the other states along the Atlantic seaboard, of prohibitory legislation similar to the Maryland statutes, would result in the complete destruction of commerce in menhaden products among the states, and would disrupt the various important industries which depend upon menhaden products. See *Minnesota v. Barber*, 136 U. S. 313. Such retaliatory legislation is not only possible but imminent, and the disastrous effects which would result therefrom are of far greater importance in the national interest than the inconsequential effect which would occur to a small and special class of Maryland citizens if the enforcement of the prohibitory regulations here in question were prevented.

3. It is beyond all reasonable doubt that Section 258 of Article 66C of the Annotated Code of Maryland is, as to the individual Appellants, a violation of the Privileges and Immunities Clause of the Constitution of the United States, and, as to the corporate Appellants, a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Toomer v. Witsell*, 334 U. S. 385. In that case the court held that the discrimination was so great as to be virtually exclusionary. In the instant case, the discriminatory prohibition is actually and openly exclusionary.

Conclusion

For the reasons above set forth, it is respectfully submitted that this Honorable Court has jurisdiction on appeal to review the judgment of the specially constituted three-judge district court entered in this cause.

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. BOYD CORSA, FISH PRODUCTS COMPANY OF NEW JERSEY, A NEW JERSEY CORPORATION, ATLANTIC NAVIGATION COMPANY, A NEW JERSEY CORPORATION, SEACOAST PRODUCTS, INC., A DELAWARE CORPORATION, AND FISH PRODUCTS COMPANY, A DELAWARE CORP., ET AL.,

Plaintiffs,

VERSUS

JOHN P. TAWES, FRED P. GLOSE AND JOHN R. JEWELL, CONSTITUTING THE COMMISSION OF TIDEWATER FISHERIES OF MARYLAND, AND DANIEL T. PRETTYMAN, STATE'S ATTORNEY FOR WORCESTER COUNTY, MARYLAND,

Defendants.

Before Sobeloff, Circuit Judge, and Chesnut and Thomsen, District Judges.

SOBELOFF, Circuit Judge:

By this suit an individual Delaware plaintiff and corporate plaintiffs of New Jersey and Delaware challenge the constitutionality of certain provisions of Maryland's fishing laws. Two sections of the law are under attack: one, Section 259 of Article 66C of the Annotated Code of Maryland (1951), prohibits the use of purse nets in any of the tidal waters of the State; the other, Section 258, excludes non-residents from fishing privileges in Maryland's tidal waters. Pursuant to Title 28 U. S. C. A., Sections 2281, 2284, this three-judge Court was convened.

The plaintiffs are engaged in various aspects of the menhaden fishing industry — some are menhaden fishing boat owners, others are lessees of such boats and operate processing plants out of the State, The individual plaintiff,

Corsa, is a menhaden boat captain. The Menhaden is a migratory fin fish which travels in large schools and is found during the summer months off the coast of Maryland, and neighboring states, both within and beyond the three-mile belt, and to some extent in the Chesapeake Bay. They are commercially valuable as a source of fish oil and meal and other useful by-products, and plaintiffs' plants, after processing the fish, ship substantial quantities of these products in interstate commerce.

The established practice of the industry is to catch the fish by means of a purse net, for they cannot be caught economically in commercial quantities in any other way. When a school is sighted, the mother boat sends out two smaller seine boats with the purse net. This device, which is often a quarter of a mile in length and eighty feet deep, is designed to capture entire schools of menhaden in one quick operation. Rings on the lower edge of the net rest upon the ocean floor, and the net reaches to within one or two feet above sea bottom. When the school is encircled, the seine boats draw the ends of the net together, closing the purse and entrapping the fish within. Plaintiffs' operations, so far as Maryland territorial waters are concerned, are limited to the ocean strip; they do not fish in the Maryland portion of the Chesapeake Bay or its tributaries.

On June 26, 1956 Corsa's vessel, by use of a purse net, caught a load of menhaden in the Atlantic Ocean within three miles of the Maryland coast. He was thereupon served with a summons by an agent of the defendant Commission of Tidewater Fisheries of Maryland, charging him with violating Article 66C, Section 259, Annotated Code of Maryland (1951), the pertinent provisions of which are not limited to menhaden but prohibit the catching of any fin fish in Maryland tidal waters by use of a purse net. Criminal proceedings thereafter were instituted against Corsa in the Circuit Court for Worcester County.

This suit was brought by the plaintiffs to enjoin the enforcement of Section 259 on the grounds that it violates the due process clause of the 14th Amendment and unduly bur-

dens interstate commerce in contravention of Article I, Section 8 of the United States Constitution. Others similarly engaged in the menhaden industry and faced with prosecution under Section 259 have joined as intervening plaintiffs. The criminal prosecution against Corsa has been continued by the Circuit Court of Worcester County awaiting the outcome of this case. Pending the proceeding in this Court further enforcement of the statute against the plaintiffs has, with the consent of the State, been temporarily restrained by us.

Since the decision in *Manchester v. Massachusetts*, 139 U. S. 240, (1890) it has been beyond dispute that in the absence of conflicting Congressional legislation under the commerce clause, regulation of the coastal fisheries is within the police power of the individual states under the doctrine of *Cooley v. Board of Port Wardens*, 53 U. S. 299. *Manchester v. Massachusetts*, supra, p. 266; *Skiriotes v. Florida*, 313 U. S. 69, 75; *Toomer v. Witsell*, 334 U. S. 385, 393. Congress has not sought to impose uniformity, but has been content to leave the matter to local authority and has recently made this intention explicit in the Submerged Lands Act of 1953, U. S. C. A. Title 43, Sections 1301(e) and 1311(a).

While in the exercise of this power the State is not immune from recognized constitutional limitations, it is to be remembered that in the field of conservation, as in others, courts will not strike down legislative enactments as violative of due process unless the means chosen bear no reasonable relation to the objective sought to be accomplished. *Lacoste v. Department of Conservation*, 263 U. S. 545, 552; *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 427-28. Upon such concepts, prohibitions against the use and possession of purse nets and other particular kinds of fishing devices have been upheld. See *Miller v. McLaughlin*, 281 U. S. 261.

The objection to purse nets is said to be their excessive efficiency. In seeking to prove that the legislation in question bears no reasonable relation to conservation, it has been argued before us that restrictions upon the catching of some

species of fish, including menhaden, have no effect upon conserving the supply. It is said that natural factors, beyond the control of man, such as weather, currents, and salinity, predominantly determine the abundance of fish, and it is the plaintiffs' insistence that the amount of menhaden withdrawn by fishing, regardless of the means employed, is infinitesimal in relation to the present menhaden population. Though there doubtless are differences of opinion among experts as to this and as to the need for and effectiveness of specific conservation measures, we cannot close our eyes to the manifold illustrations of experience, where man's over-exploitation has sharply diminished or even extinguished the supply of natural resources, wild game, and fish. As was said by the Supreme Court in *Bayside Fish Co. v. Gentry*, supra, p. 428, regarding such legislative enactments, ". . . we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose." Moreover, plaintiffs' witnesses who expressed the opinion that such conservation measures in the case of menhaden are unavailing to achieve protection of the supply, admitted that man's activities are the only factor which may be controlled. While insisting that depletion of the supply of menhaden was a possibility too remote to merit serious consideration, they conceded that no resource is inexhaustible and that a point may be reached, due to man's fishing pressure or to natural causes, where further exploitation could bring serious results.

We think, however, that the protective hand of the State may be extended before the danger is unmistakably imminent. Conditions may go unnoticed so long that when the threat is demonstrated it is too late to avert the harm. One witness for the plaintiffs testified that no matter how much a supply may be reduced by over-fishing, provided that the stock is not completely annihilated, it may in time replenish itself. We need not quarrel with this statement of scientific opinion, but in the practical management of its resources, the State may conclude that the time for action is long before the destruction has gone that far. The State is inter-

'ested not merely in the preservation of specimens for museums but in conserving and perpetuating a constant supply.

That a natural resource is subject to injury by causes beyond man's control is not a sufficient reason for us to require the State to refrain from such measures as may reasonably be taken to prevent unnecessary depredations by man. A similar aspect of human experience is in the field of medicine. While it is realized that human health and the life span are largely governed by factors beyond man's control, this realization is not deemed sufficient reason for excluding such efforts as the medical profession can make to protect man against disease and death.

If there is any fact so firmly fixed in the public consciousness as to justify judicial notice of it by judges residing in Maryland it is that the formulation and reformulation of policy, and the administration and enforcement of the State's fishing laws have been matters of perennial and spirited discussion and not infrequent legislation in the General Assembly.[1] Again and again elaborate studies have been made by public officers and commissions. Their recommendations have been debated by the commercial interests concerned, by sports fishermen, in the press and in the legislative chambers. The need for and the effectiveness of various measures regulating the practices, places, and instrumentalities of fishing, have been argued at length at almost every legislative session.

Opinion as to many of these matters is sharply divided, both as to whether particular regulatory provisions have

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[1] The regulation of purse netting has had a long history in Maryland. Some of the enactments to be found are: Ch. 740, Acts of 1908 which contained a preamble reciting that purse nets tended to decrease the stock of food fish, and added Sections 2A and 2B to Article 39, 1904 Code; Ch. 828, Acts of 1914, amending Section 2B; Ch. 14, 1917 (Extraordinary Session) codified as Article 39, Section 4, 1914 Code; Ch. 471, Acts of 1929, Sections 26, 27, 28; Ch. 175, Acts of 1931, codified as Article 39, Section 30, 1939 Code; Ch. 709, Acts of 1941, repealing Section 30 of Article 39, 1939 Code, and revising Section 28; Section 28 of Article 39, 1939 Code, substantially the same as the present Section 259, except for minor revisions made by Ch. 191, Acts of 1943, and Ch. 867, Acts of 1947.

the desired result upon fish population, and also as to the social policy that the State should follow in the management of its resources. It is a difficult problem or complex of problems, and the issues cannot be resolved for all time by any single enactment. Questions as to the adequacy of existing laws bring serious conflict, and no one is in a position to demonstrate absolutely at what point certain protective measures are no longer required. Wide fluctuation in the abundance of various species is not unknown and is a fact acknowledged by the plaintiffs' witnesses. Men disagree as to what is a reasonable and benign utilization of natural resources, and what is destructive exploitation.

Where should these conflicts be resolved? Certainly the courts are not the appropriate forum. These matters are peculiarly legislative in character, and not within the judicial sphere.

It was suggested that menhaden are not fit for human consumption and are not a chief source of food for edible species. Upon this foundation it is argued that menhaden are not a fit subject for conservation, and that to avoid violation of due process, we should carve out of the statutory prohibition against purse netting an exception for this particular fish. In addition to what we have already said there are further considerations which require us to deny this contention.

Considering that fishing has been a principal occupation of man for countless centuries it is astonishing how little precise information we have as to the habits, migrations, propagation, and proper methods of conserving the supply of fish generally. In this nebulous field the menhaden is no exception; indeed it may take rank among those about which least is known. In recent years, marine biologists have been conducting experiments to enlarge the sphere of knowledge. Some of these experiments were testified to by plaintiffs' witnesses, particularly with regard to the extent to which menhaden constitute a food supply for other fish. While these studies indicate that menhaden are not the principal food supply for food fish in Maryland waters, they are a source of some consequence.

A witness for plaintiffs supported his testimony by reliance upon an examination of the contents of the stomachs of 750 blue fish caught in Maryland waters. Menhaden were found in 11 per cent of them, and many of the other 89 per cent contained no food. Reasoning from this slender basis he inferred that menhaden constitute but 11 per cent of the food supply of blue fish. Eleven per cent strikes us as not inconsiderable, but the inference itself seems dubious. It is about as logical to draw from this meager data the broad conclusion that 11 per cent is the limit of the menhaden role in the blue fish diet, as it would be to interpret the experiment as establishing that considerable numbers of blue fish live without food.

Moreover, were the supply of menhaden diminished it might mean that the fish which feed in part upon menhaden would look to other sources, perhaps other food fish, as the witness Hollis supposed. Nor has it been ruled out that other non-edible fish which live in whole or in part on menhaden are themselves eaten by food fish. These assuredly are factors that may be considered. Neither the duration nor the scope of the scientific studies to which we have been directed is such that this court could find in them demonstration beyond further debate that, as applied to menhaden, the regulation here challenged has no reasonable relation to the ends sought to be achieved. The matter was at the time of its enactment and still is one fairly within the province of legislative judgment. We cannot say that the observation made in *Manchester v. Massachusetts*, supra, p. 265, that menhaden are food for other fish has been clearly proved to be erroneous. If there is new light that is claimed to cast doubt on the legislative assumptions, it should be called to the attention of the legislature. If the legislature deems it appropriate to carve out exceptions it may do so.[2] It is not a judicial function to write amendments into the law to accord with the court's ideas of wisdom and appropriateness.

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[2] Indeed a bill is now pending in the legislature which would create an exception for menhaden. Senate Bill 528, 1957 Session.

The difficulty of enforcement is also a salient feature entitled to weight. It was given point by the plaintiff Corsa while on the stand. Testifying that he was aware of the Maryland prohibition against purse nets within the three-mile belt, he stated with astonishing candor that he habitually fished for menhaden within this area whenever he thought he would not be apprehended. The difficulty of enforcement would be compounded if purse netting for menhaden were permitted within the three-mile coastal area. It is obvious that it would be more burdensome to police against purse netting for food fish if purse netters were permitted to enter the area in pursuit of menhaden; an enforcement official so testified.

Decision as to whether the State's interest requires a prohibition of all purse netting in this area in order to protect sports fishing, which itself supports a considerable industry in this State, is also a legislative prerogative. It is a legitimate objective for the State to sponsor sports fishing and the economic interests dependent upon it. Ocean City, the principal seacoast vacation resort of Maryland, is along this coast and numerous sport fishing boats sail from it. While there was testimony of isolated instances where menhaden fishermen operated side by side with game fishermen, the testimony also showed, and it is a matter of common knowledge, that sports fishermen seriously object to purse netting as interfering with their pursuits. The Chairman of the defendant Tidewater Fisheries Commission, Mr. John P. Tawes, testified that his office receives many such complaints from sports fishermen.

Other witnesses testified that New York and New Jersey regulate purse netting within particular areas for the protection of the sports fishery. New York, they said, restricts purse netting in the vicinity of Coney Island, and New Jersey does not allow the practice within two miles of shore in certain areas. If Maryland deems it necessary or desirable to apply the restriction for the entire three-mile width of its short coastal jurisdiction, it may do so.

For these reasons we do not think that the Maryland statute, Section 259, as applied to fishing for menhaden, de-

prives the plaintiffs of their liberty or property without due process of law.

We now turn to the second objection raised by the plaintiffs, namely, that the purse-netting prohibition effects an undue burden upon interstate commerce. This, likewise, we find without merit.

We now turn to the second objection raised by the plaintiffs, namely, that the purse-netting prohibition effects an undue burden upon interstate commerce. This, likewise, we find without merit.

Doubtless catching menhaden and processing them into useful products is a legitimate occupation and is commerce the interstate aspects of which cannot be interfered with arbitrarily. But the same Constitution which puts interstate commerce under the protection of Congress, recognizes the sovereignty of the states in local regulation for the protection of their natural resources. If the adverse effect on interstate commerce is only incidental and indirect and is outweighed by the local benefits which the statute is designed to achieve, the commerce clause will not render the enactment invalid. *S. Pacific Co. v. Arizona*, 325 U. S. 761, 770-1. The local benefits to which we have previously referred clearly indicate a rational basis for the legislation here questioned, and that the interference with interstate commerce is merely incidental. There is nothing to prevent menhaden fishermen from seeking their catch beyond the three-mile belt, for the evidence shows that during the menhaden season the fish are present in plentiful numbers as far as seventy-five miles off coast, and it is the practice to fish up to at least eight miles out.

The plaintiff Corsa testified on direct examination that excluding him from the Maryland three-mile coastal belt would affect his catch 20 per cent. On cross examination, however, he clarified his statement, saying that he merely meant that he caught 20 per cent of his catch opposite the Maryland shore both within and beyond the three-mile belt. Regardless of the actual per cent of loss caused, we may, in any event, assume that it would be more convenient, and

financially advantageous for him and others engaged in the same business to fish close to shore. But we cannot say that the commerce clause requires the State to yield to mere convenience and advantage to particular industries, when it may reasonably consider conservation of paramount importance. Such questions are primarily of a local nature. In *Toomer v. Witsell*, supra, p. 394-5, which dealt with a poundage tax upon fish levied by South Carolina, the Court held that the tax was not a burden on interstate commerce because the taking of the fish occurred before interstate commerce began.

The legislative policy of Congress manifested in the Black Bass Act[3] recently expanded to include other fish[4] is pertinent to the inquiry here, if not controlling. That statute makes it unlawful for anyone to transport fish out of a state where such transportation is prohibited by state law or where the taking of fish is, in the first instance, prohibited by state law. It can be inferred that this statute broadly recognizes the right of the states to burden interstate commerce in fish by forbidding their transportation or by interposing restrictions earlier in the chain of events by prohibiting fishing altogether. It may at least be said that whatever burden Section 259 imposes upon interstate com-

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[3] c. 346, 44 Stat. 576; c. 801, 46 Stat. 845; 16 U. S. C. A. Section 852.

[4] c. 348, 61 Stat. 517; amended c. 911, 66 Stat. 736; 16 U. S. C. A. Section 852. *"Transportation forbidden where law has been violated.* It shall be unlawful for any person to deliver or knowingly receive for transportation, or knowingly to transport, by any means whatsoever, from any State, Territory, or the District of Columbia, to or through any other State, Territory, or the District of Columbia, or to or through any foreign country, any black bass or other fish, if (1) such transportation is contrary to the law of the State, Territory, or the District of Columbia from which such black bass or other fish is or is to be transported, or is contrary to other applicable law, or (2) such black bass or other fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time contrary to the law of the State, Territory, or the District of Columbia in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported or contrary to other applicable law; . . ."

merce by prohibiting purse netting has been condoned by the Congress.

We conclude, therefore, that Section 259 is not repugnant either to the due process clause of the 14th Amendment or to the commerce clause of the Constitution. The relief prayed, must therefore be denied.

The plaintiffs' challenge is aimed also at Section 258 of Article 66C, on the ground that it discriminates against non-residents in violation of the privileges and immunities clause of the 14th Amendment or, perhaps more accurately, Article IV, Section 2 of the Constitution of the United States. Inasmuch as the State has not attempted to enforce Section 258 against the plaintiffs and has indicated its intention not to do so, and the plaintiffs did not further press for an adjudication of their rights under Section 258, we do not decide the constitutional question raised as to this section in the Bill of Complaint. Even though serious constitutional doubts may be raised (See *Toomer v. Witsell*, supra), a court will not adjudicate constitutional issues unless necessary to dispose of the instant case.

Accordingly, the Bill of Complaint will be dismissed with costs.

SIMON E. SOBELOFF,
U. S. Circuit Judge.

I concur.

W. CALVIN CHESNUT,
U. S. District Judge.

I concur.

ROSZEL C. THOMSEN,
U. S. District Judge.

APPENDIX B

Annotated Code of Maryland (1951), Article 66C, Vol. 2, page 3262.

Tidal Waters

258. (Who may Fish.) It shall be unlawful for any person who is not a bona fide citizen or land owner of Maryland to fish in the tidal waters of this State with nets of any description. Nothing in the above shall be construed to permit such citizen to fish in any tributary waters beyond the jurisdictional limits of the county whereof he is a resident or land owner, except that residents or land owners of the counties bordering on a dividing river may fish such river in common, but not in any creek, cove, river, inlet or sound emptying into the said dividing river and lying wholly within a county other than the one of which he is a resident or land owner, except as provided for in Section 249, sub-title "Riparian Rights," except that a non-resident of one county may fish in the waters within the jurisdictional limits of another county after having first obtained the written permission of the abutting land-owner and providing further that the provisions of this section shall not apply to the catching of eels.

259. (Method of Fishing.) (a) It shall be unlawful to take or catch fin fish for any purpose in the tidal waters of this State by the use of a gig or gig iron, or by the use of any purse net, buck net, beam trawl, otter trawl, trammel net, troll net or drag net. Any person found guilty of fishing or taking fish with any of the equipment or divices listed herein, with the exception of a gig or gig iron, shall be guilty of a misdemeanor and upon conviction thereof shall be fined the sum of not less than $100.00 nor more than $1,000.00, and shall stand committed to the Baltimore City jail or to the county jail until such fines and costs are paid. Any person found guilty of the illegal use of a gig or gig iron shall be subject to the penalties provided in Section 300 of this sub-title.